Supreme Court, U.S.
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In The

Supreme Court of the United States

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7,

Cross-Petitioner,

v.

CITY OF McALESTER, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit render a decision inconsistent with Federal Law by determining that when a water district purchases its own loans under the Agricultural Credit Act of 1987 it forfeits its 7 U.S.C. §1926(b) protection?

2. Did the Tenth Circuit render a decision inconsistent with Federal Law by rejecting the Bright Line Rule for the purposes of 7 U.S.C. §1926(b) for those water districts which have defined geographical boundaries under state law?

PARTIES TO THE PROCEEDING

Petitioners/Cross-Respondents

City of McAlester and the McAlester Public Works Authority. The McAlester Public Works Authority is a public trust, of which the City of McAlester is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "City of McAlester," and "McAlester" are intended to encompass both Petitioners.

Respondent/Cross-Petitioner

Pittsburg County Rural Water District No. 7, referenced herein as "Pitt-7", is an agency and legally constituted authority of the state of Oklahoma (82 Oklahoma Statutes §1324.6), created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 Oklahoma Statutes §1324.3).

Other Respondents

At the district-court level, this action involved a number of "additional defendants," which were identified as co-appellees at the court-of-appeals level. The additional respondents to this proceeding are: Kenneth W. Sherrill, Linda F. Sherrill, Bar-19, Blessing Corp., d/b/a Edison Plastics, MIG, Inc., Southwest Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Farms, Inc., Dennis DeFrange, Terry Kinyon, Pittsburg County Regional Exposition Authority, the Board of County

PARTIES TO THE PROCEEDING – Continued

Commissioners of the County of Pittsburg, H.G. Gilliam, Chairman Bill Webber, Oben Weeks, and Thundercreek Golf Course Trust Authority. In addition, the Oklahoma Municipal League and the National League of Cities were permitted to participate at the court-of-appeals level as amicus curiae.

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OPINION BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. The Order and Judgment are reported in a table at 211 F.3d 1279, and on Westlaw at 2000 WL 525942. A copy of the Order and Judgment is included in Petitioners' Appendix A, at page 1a. The Court of Appeals' order denying rehearing is unpublished, and is included in Petitioners' Appendix E, at page 54a. The Orders and Judgment by the United States District Court for the Eastern District of Oklahoma are unpublished, although the District Court's November 26, 1997 Order is reported on Westlaw at 1997 WL 835210. The District Court Orders and Judgment are included in Petitioners' Appendix B, at page 17a, in Petitioners' Appendix C, at page 20a, and in Petitioners' Appendix D, at page 34a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its Order and Judgment on May 2, 2000. [Petitioners' Appendix A.] On May 16, 2000, Petitioners filed a timely Combined Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). The United States Court of Appeals for the Tenth Circuit denied the Combined Petition on May 31, 2000. [Petitioners' Appendix E.] Petitioners' Petition for Writ of Certiorari was filed within 90 days of the denial of the Combined Petition. The Court's jurisdiction is sought under 28 U.S.C. §§1254(1), 2101(c), and 2106. This Conditional Cross-Petition For Writ of Certiorari is filed within

30 days after the Petition For Writ of Certiorari was placed on the docket.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

7 U.S.C. §1926: Water and waste facility loans and grants.[1]

(b) Curtailment of limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. §1929a, Other Provisions:

Sale of rural development notes. Act Oct. 21, 1986, P.L. 99-509, Title I, Subtitle A, §1001(a), (c)-(e), 100 Stat. 1874; §1001(f) and (g), as added Jan. 6, 1988, P.L. 100-233, Title VIII, §803, 101 Stat. 1714; §1001(h) as added Dec. 12, 1989, P.L. 101-220, §12, 103 Stat. 1883, provides:

"(a) Sales required. The Secretary of Agriculture, under such terms as the Secretary may

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[1] The full text of 7 U.S.C. §1926 is set forth in Petitioners' Appendix E.

prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act [this section] in such amounts as to realize net proceeds to the Government of not less than –

(1) $1,000,000,000 from such sales during fiscal year 1987,

(2) $552,000,000 from such sales during fiscal year 1988, and

(3) $547,000,000 from such sales during fiscal year 1989.

"(c) Contract provisions. Consistent with section 309A(e) of the Consolidated Farm and Rural Development Act [this section], as amended by subsection (b), any sale of notes or other obligations, as described in subsection (a), shall not alter the terms specified in the note or other obligation, except that, on sale, a note or other obligation shall not be subject to the provisions of section 333(c) of the Consolidated Farm and Rural Development Act [7 U.S.C. §1983(c)].

"(d) Eligibility to purchase notes. Notwithstanding any other provision of law, each institution of the Farm Credit System shall be eligible to purchase notes and other obligations held in the Rural Development Insurance Fund and to service (including the extension of additional credit and all other actions necessary to preserve, conserve, or protect the institutions's interest in the purchased notes or other obligations), collect, and dispose of such notes and other obligations, subject only to such terms and conditions as may be agreed to by the Secretary of Agriculture and the purchasing institution

and as may be approved by the Farm Credit Administration.

"(e) Loan servicing. Prior to selling any note or other obligation, as described in subsection (a), the Secretary of Agriculture shall require persons offering to purchase the note or other obligation to demonstrate –

"(1) an ability or resources to provide such servicing, with respect to the loans represented by the note or other obligation, that the Secretary deems necessary to ensure the continued performance on the loan; and

"(2) the ability to generate capital to provide the borrowers of the loans such additional credit as may be necessary in proper servicing of the loans.

"(f) Right of first refusal. (1) In general. Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall –

"(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

"(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

"(2) Determination of offering price. (A) Authority. The Secretary of Agriculture shall determine, in accordance with subparagraph (B), the price at which a note or other obligation shall be offered for sale under this subsection.

"(B) Price. Such price shall be determined by discontinuing the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

"(3) Prohibitions. (A) Purchase of obligation not tied to purchase of other obligations. The Secretary of Agriculture shall not require the issuer of any unsold note or other obligation to be offered for sale under this subsection to purchase any other such note or other obligation as a condition of the sale of any such note or other obligation to the issuer.

"(B) Offer to be made without regard to financing. The Secretary shall offer notes or other obligations for sale to the issuers thereof under this subsection without regard to the manner in which such issuers intend to finance the purchase of such notes or other obligations. However, the price of sale to any issuer using tax exempt financing shall be determined using a yield reflective of the Schedule of Certified Interest Rates as published monthly by the Secretary of the Treasury.

"(g) Applicability of prohibition on curtailment or limitation of service. Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. §1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

"(h)(1) Notwithstanding the provisions of section 633 of the Rural Development, Agriculture, and Related Agencies Appropriations Act, 1989 (Public Law 100-460) [unclassified], the Secretary of Agriculture shall offer to the issuer of any unsold note or other obligation described in paragraph (2)(A) for which such issuer made the good faith deposit described in paragraph (2)(A) the opportunity to purchase such note or other obligation consistent with the provisions of this subsection and subsections (f)(2) and (f)(3).

"(2) The provisions of this subsection shall apply only to those issuers who:

"(A) on or before March 9, 1989, made a good faith deposit under this section for fiscal year 1989 with the Secretary to purchase a note or other obligation held in the Rural Development Insurance Fund; and

"(B) otherwise meet all eligibility criteria, as such criteria existed immediately prior to May 9, 1989, at the time the purchase occurs under this subsection.

"(3) The opportunity to purchase any such note or other obligation shall be held open, under the policies and procedures in effect under subsections (f)(2) and (f)(3) immediately prior to May 9, 1989, for 150 days after the date of enactment of this subsection. The Secretary shall not require any further good faith deposit from issuers who qualify under this subsection. The Secretary shall notify eligible issuers of the opportunity afforded under this subsection within 30 days after the date of enactment of this subsection and may require such issuers to

express an intention to purchase their note or other obligation by a date certain.".

7 C.F.R. §1942.17(b)(2):

(2) Facility. (i) Facilities must be located in rural areas, except for utility type services such as water, sewer, natural gas, or hydroelectric, serving both rural and non-rural areas. In such cases, FmHA or its successor agency under Public Law 103-354 funds may be used to finance only that portion serving rural areas, regardless of facility location.

(ii) Essential community facilities must primarily serve rural areas.

(iii) For water or waste disposal facilities, the terms "rural" and "rural area" will not include any area in any city or town with a population in excess of 10,000 inhabitants, according to the latest decennial Census of the United States.

(iv) For essential community facilities, the terms "rural" and "rural area" will not include any area in any city or town with a population in excess of 20,000 inhabitants, according to the latest decennial Census of the United States.

7 C.F.R. §1942.17(e)(1):

(e) Facilities for public use. All facilities financed under the provisions of this subpart shall be for public use.

(1) Utility-type service facilities will be installed so as to serve any user within the service area who desires service and can be feasiblely and legally served. Applicants and borrowers must obtain written concurrence of the FmHA or its successor agency under Public Law 103-354 prior to refusing service to such user. Upon failure to provide service which is

reasonable and legal, such user shall have direct right of action against the applicant/borrower. A notice of the availability of this service should be given by the applicant/borrower to all persons living within the area who can feasiblely and legally be served by the phase of the project being financed.

7 C.F.R. §1942.17(n)(2)(vii):

(2) Loan resolutions. Loan resolutions will be adopted by both public and other-than-public bodies using Form FmHA or its successor agency under Public Law 103-354 1942-47, "Loan Resolution (Public Bodies)," or Form FmHA or its successor agency under Public Law 103-354 1942-9, "Loan Resolution (Security Agreement)." These resolutions supplement other provisions in this subpart. The applicant will agree:

* * *

(vii) To provide adequate service to all persons within the service area who can feasibly and legally be served and to obtain FmHA or its successor agency under Public Law 103-354s concurrence prior to refusing new or adequate services to such persons. Upon failure of the applicant to provide services which are feasible and legal, such person shall have a direct right of action against the applicant organization.

STATEMENT OF THE CASE

Pitt-7 is an Oklahoma Rural Water District which is now, and has been at various times in the past, indebted to the Federal Government for loans obtained to develop

its water distribution system. Pitt-7 brought this action seeking to enjoin McAlester from selling water within its service area, and to recover damages for past water sales in violation of Title 7 U.S.C. §1926(b).

Title 7 U.S.C. §1926(b) [hereafter §1926(b)], states that water service provided or made available through an indebted water district may not be curtailed or limited by a municipality or other public body. As interpreted by the Courts, this provision prohibits a municipality or other public body from selling water within the water district's service area during the period of its indebtedness.

Over the years Pitt-7 and its predecessors have received various federal loans. The original loans were taken out in 1967 and remained in place until *purchased* by Pitt-7 pursuant to the Agricultural Credit Act of 1987, in 1989. On June 15, 1994, Pitt-7 obtained a new loan, on which it remains indebted today.

The District Court granted summary judgment for McAlester finding in pertinent part:

a. That the purchase of its own loans by Pitt-7 in 1989, extinguished its §1926(b) protection until it obtained its next FmHA[2] loan on June 15, 1994.

b. That Pitt-7 had not made service available to the customers in dispute, rejecting the "Bright Line Rule", and adopting a "Pipes in The Ground Test".

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[2] Although the Farmer Home Administration (FmHA) is now known as the Rural Economic and Community Development Service, for the sake of simplicity, this Brief will refer only to the "FmHA".

Pitt-7 made a timely appeal to the Tenth Circuit which held in pertinent part:

a. That the purchase of its own loans by Pitt-7 in 1989, extinguished Pitt-7's §1926(b) protection until it obtained its next FmHA loan on June 15, 1994.

b. That although Pitt-7 does have a legal obligation to provide service under the Federal Regulations, such legal obligation is not the legal equivalent of making service available for the purpose of §1926(b).

c. That applying the "Pipes In The Ground Test", there is a question of fact concerning whether Pitt-7 has made service available, and reversing and remanding the case to the Trial Court on this issue.

ARGUMENT I: THE TENTH CIRCUIT'S DETERMINATION THAT PITT-7'S PURCHASE OF ITS OWN LOANS PURSUANT TO THE AGRICULTURE CREDIT ACT OF 1987 EXTINGUISHED PITT-7'S §1926(b) PROTECTION IS INCONSISTENT WITH FEDERAL LAW

Pitt-7 originally borrowed funds and became indebted to the FmHA in 1967. Pitt-7 remained indebted to the FmHA from 1967 to 1989, when the FmHA offered a program whereby the FmHA loan could be purchased. Pitt-7 participated in that program by purchasing its loan from the FmHA in 1989. On June 15, 1994 Pitt-7 again obtained a loan from the FmHA, on which it remains indebted today.

The *"purchase"* of the loans by Pitt-7 was conducted pursuant to the Agricultural Credit Act of 1987 (the "Act"), which provided in pertinent part that the protections afforded by §1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold". The Act mandated as follows:

1. The Secretary of Agriculture was required to sell notes and other obligations held by the Rural Development Insurance Fund; Act, Oct. 21, 1986, P.L. 99-509, Title I, Subtitle A, §1001(a), (c)-(e), 100 Stat. 1874; §1001 (f) and (g), as added Jan. 6, 1988, P.L. 100-233, Title VIII §803, 101 Stat. 1714; §1001(h) as added Dec. 12, 1989, P.L. 101-220, §12, 103 Stat. 1883, hereinafter referenced as "7 U.S.C. §1929a, Other Provisions".

2. The debtor under the note or other obligation was provided a "right of first refusal" to *"purchase"* the note or other obligation [Title 7 U.S.C. §1929a, Other Provisions, Subsection (f)]; and

3. The protection afforded by §1926(b) shall remain applicable to all notes or other obligations "sold or intended to be sold under this section" [Title 7 U.S.C. §1929a, Other Provisions, Subsection (g)].

The wording and intent of this legislation was to provide that the Debtor (Water District) would retain the protections of §1926(b) for at least the period of the note for any note sold or intended to be sold under this section whether such note was purchased by a third party or the Water District itself.

The Supreme Court of Colorado has addressed this very issue holding that the "reacquisition" of the indebtedness by the water district "did not discharge the underlying debt" for the purpose of §1926(b), noting that:

> Therefore, we are guided by the unambiguous language in Section 803(g), extending the protection of Section 1926(b) to 'all notes or other obligations sold or intended to be sold under this section.' . . . this language supports our conclusion that the 1981 revenue bond was not discharged when the Defendant reacquired the instrument from the FmHA in 1988.
>
> * * *
>
> The fact Congress provided a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that Congress intended to allow an issuer to reacquire its bond or note without losing the protection provided under §1926(b).

City of Grand Junction v. UTE Water Conservatory District, 900 P.2d 81, 91 (Co. 1995).

The Alabama Supreme Court has reached the same conclusion. See *City of Wetumpka v. Central Elmore Water Authority*, 703 S.2d 907, 913 (Ala. 1997).

The Sixth Circuit in *Scioto County Regional Water District No. 1 v. Scioto Water, Inc.*, 103 F.2d 38 (6th Cir. 1996) held that §1926(b) protection is only extended when the notes are purchased by third parties. However such decision ignores the plain language of Title 7 U.S.C. §1929a, Other Provisions.

The Court in *City of Wetumpka* found the rationale of the Colorado Supreme Court in *City of Grand Junction* to be superior to that used by the *Scioto* court. *City of Wetumpka*, at 913. The *Scioto* court distinguished the *City of Grand Junction* case, noting that *City of Grand Junction* found that §1926(b)'s protection extended to those that buy back their indebtedness *with the intent not to discharge the instrument.*

ARGUMENT II: THE TENTH CIRCUIT'S REJECTION OF THE "BRIGHT LINE RULE" IS INCONSISTENT WITH FEDERAL LAW

The courts have universally held that the purposes of §1926(b) are "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user costs, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *North Alamo Water Supply v. City of San Juan, Texas*, 90 F.3d 910, 915 (5th Cir. 1991)

Section 1926(b) furthers its purposes by protecting the territory served by such association against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [section §1926(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of

> municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

> "The service area of a federally indebted water association is ***sacrosanct***. Every Federal Court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA – indebted rural water association from municipal encroachment." (Emphasis added)

North Alamo Water Supply v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996).

The Courts, which have addressed §1926(b), make it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The clear message of the three federal cases applying 7 U.S.C. §1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 425 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

A municipality is simply not allowed to encroach upon the services provided by a Rural Water District ***by any means***, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what is forbidden by other means, would render nugatory the clear purpose of §1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987); see also *Glenpool Utility Services v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); and *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986).

Keeping in mind the purposes to be served by §1926(b) and the consistent rulings that §1926(b) is to be liberally construed to further those purposes, it is evident that §1926(b) does not allow a *race* to construct service lines. It is not the first entity which constructs a line to an area that has the right to serve that area (which would be the result of McAlester's interpretation is adopted). Such an interpretation would defeat the stated purposes of §1926(b) by decreasing the number of potential users of such systems and thereby increasing the per-user costs.

The appropriate rule is that a water district makes water service available under §1926(b) in either of two alternative ways: (1) the "Bright Line Rule", by inclusion of the customers within the geographic boundaries of the district as established by state law (having the legal obligation to provide service) *or* (2) the "Pipes In The Ground Test" by having the right to provide service and the facilities within the proximity of the area from which service could be made within a reasonable time.

The Fifth Circuit held that a duty to provide service is the *"legal equivalent"* to making service available:

> To secure the protections of §1926(b) the Utility must establish that (1) it has a continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the Utility "made service available." As of the end of 1993, the Utility owed the FmHA approximately $12,000,000. The City does not contest that the first, "indebtedness" element is satisfied. Instead, it contends that the Utility failed to establish the second, "made service available" element. We disagree.
>
> Under Texas law, the Certificate gives the Utility has exclusive right to serve the area within its CCN and obligates it "to serve every consumer within its certified area and . . . render continuous and adequate service within the area or areas." **We hold that the Utility's state law duty to provide service is the *legal equivalent* to the Utility's "making service available" under §1926(b).** When confronted with a similar issue, other courts have reached the same result, holding that *when state law obligates a utility to provide*

> *water service, that utility has, for the purposes of §1926(b), "made service available."*
>
> In the alternative, the district court found as a factual matter that the Utility had "made service available." Specifically, the district court made three findings of fact relevant to this conclusion: (1) The Utility current provides water service to subdivisions adjacent to the disputed areas; (2) the Utility has lines and adequate facilities to provide service to the disputed areas; (3) the Utility has not refused service to anyone who has requested service within the Certificated Area. These findings of fact are not clearly erroneous. Accordingly, on the strength of these alternative legal and factual determinations, we affirm the district court's conclusion that the Utility had "made services available" to the disputed areas. As a result, we also agree with the holding of the district court that the City violated §1926(B).

North Alamo, at 915-916. (Emphasis added)

Lexington-South Elkhorn Water District v. City of Wilmore, 93 F.3d 230 (6th Cir. 1996) at first glance appears to contradict *North Alamo.* However, upon closer scrutiny it becomes clear that unlike Oklahoma and Texas, the water districts in Kentucky are not established by well defined geographic boundaries at creation. In Kentucky, the water district must apply for and receive a Certificate of Convenience and Necessity in order to construct and operate a water distribution system in a particular area. Ky. Rev. Stat. Ann. §278.020(1). In the *Lexington* case, the water district had not made such an application and had not received the requested certificate in relation to the area in

dispute, i.e., the area challenged was not within the geographic boundaries of the water district as defined by state law. *Lexington* at p. 235.

In Oklahoma, as in Texas (*North Alamo*), once a water district is established it has the right and authority to construct and operate a water distribution system within its entire Territory. In fact in Oklahoma the procedure to establish the Territory of the water district requires a showing of need and convenience. (Title 82 Oklahoma Statutes §1324.6).

In *Sioux Center*, the Court reached the same conclusion as did the *North Alamo* Court, i.e., that "a legal right and responsibility to serve an area *may stand alone* as fulfilling the 'made service available' requirement of §1926(b)." *Rural Water System #1 v. City of Sioux Center*, 967 Supp. 1483, 1526 (N.D. Iowa 1997).

A reading of the *North Alamo* and *Sioux Center* cases reveals that a rural water district makes service available by one of two methods:

1. By having the obligation to provide service i.e. inclusion of the customers within the district's geographic boundaries as established by state law, ***or***

2. If there is no obligation to provide service, by having the right to provide service, and the physical ability to provide service (the "Pipe In The Ground Test").

In this case, Pitt-7 has made service available to the disputed areas both by having the customers included within its geographic boundaries as established by state

law ("obligation to provide service") and by having "Pipe In The Ground".

As in *North Alamo,* Pitt-7 has an obligation to serve the residents within its Territory. Oklahoma state law controls the creation of a rural water district allowing their creation for the purpose of "developing and providing an adequate rural water supply . . . to meet the needs of the rural residents within the Territory of the district." (Title 82 Oklahoma Statutes §1324.3).

The Act also provides that any landowner within the District may purchase a "benefit unit" (Title 82 Oklahoma Statutes §1324.12), *which in turn arms the landowner with a "legal right" to a service connection to the district's facilities* [Title 82 Oklahoma Statutes §1324.2(7)].

Pitt-7's obligation to provide service to the residents within its Territory is further supported by the fact that Pitt-7 is specifically authorized by state law to borrow money from the Federal Government. [Title 82 Oklahoma Statutes §1324.10(A)(4)]. This in turn provides Pitt-7 with the exclusive right to sell water within its Territory pursuant to Title 7 U.S.C. §1926(b) and imposes upon Pitt-7 the obligation "To provide adequate service to all persons within the service area who can feasibly and legally be served. . . . " 7 C.F.R. §1942.17(n)(2)(vii).

> "Utility-type service facilities will be installed so as to serve any user within the service area who derives service and can be feasibly and legally served. Applicants and borrowers must obtain written concurrence of the FmHA or its successor agency under Public Law 103-354 prior to refusing service to such user. Upon failure to provide service which is reasonable

> and legal, such user shall have direct right of action against the applicant/borrower."

7 C.F.R. §1942.17(e)(1).

The term "utility-type service" includes the sale of water:

> "Facilities must be located in rural areas except for utility-type services such as *water*, sewer . . . "

7 C.F.R. §1942.17(b)(2).

The obligation imposed by 7 C.F.R. §1942 is *adopted by the State* and applies to a rural district because by empowering a rural water district to borrow funds from the federal government, and by borrowing such funds, the state *adopts and is bound* by all conditions which come with said borrowing:

> "In so borrowing, Oklahoma – through its authorized entity District No. 2 – bound itself and all of its subdivisions, including the City of Glenpool, to the conditions it had accepted".
>
> * * *
>
> Congress acted within its power in passing 7 U.S.C. §1926. Oklahoma authorized District No. 2 to borrow under that legislation, and in so doing *accepted the conditions accompanying any such loans*. (Emphasis added)

Glenpool Utility Services v. Water Dist. No. 2, 861 F.2d 1211, 1216-1217 (10th Cir. 1988).

Under this framework, one of the conditions to the loan is that Pitt-7 has the duty to provide service to all residents within its Territory [7 C.F.R. §1942.17(n)(2)(vii)]

which is the "legal equivalent" of "making service available." See *North Alamo* at pp. 915-916.

The Tenth Circuit agreed Pitt-7 had a legal obligation to provide service under the Federal Regulations (Petitioners' Appendix at p. 23a, footnote No. 9), but concluded such obligation was not the equivalent of making service available for purposes of §1926(b).

As in *City of Madison*, this Court should adopt a "Bright Line Rule" which prohibits a municipality from selling water within an indebted water district's territory as established by state law, thus eliminating costly litigation such as this:

> A condemnation case impinging on a rural water authority could easily involve both state and federal court litigation, high legal fees and considerable delay, to the ultimate detriment of the municipality, the rural water authority, and the consumers of water service. *A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.* (Emphasis added)
>
> * * *
>
> To allow expanding municipalities to "skin the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts.

City of Madison v. Bear Creek Water Ass'n, 816 F.2d 1057, 1059-1060 (5th Cir. 1987).

The "Bright Line Rule" described in *City of Madison* makes the best sense because it furthers the purposes of §1926(b), creates certainty and avoids costly litigation. If the Court does not adopt the "Bright Line Rule", then it becomes a question of fact each and every time a new customer locates within the water district, i.e., does the water district have facilities in close enough proximity to qualify for §1926(b) protection? The "Bright Line Rule" avoids such litigation by holding that if the customer is located within the Territory of the water district, as established by state law, then the indebted water district has the exclusive right and obligation to serve that customer.

The adoption of a "Bright Line Rule" is particularly appropriate in states, such as Oklahoma, where the water district is established with defined geographic boundaries. Under Oklahoma law in order to create, add to or subtract from the territory of the water district, a petition requesting such relief must be filed with the County Commissioners, who set the petition for public hearing [82 Oklahoma Statutes §1324.5]. At the public hearing, the County Commissioners are to determine several things:

1. Whether proper notice of the hearing has been given as required by Section 1324.5 of this title;

2. Whether the rural residents of the area described in the petition are without an adequate water supply, sewage facilities, gas distribution facilities or solid water management system to meet their needs;

3. Whether the construction, installation, improvement maintenance and operation of all or a combination of water words, sewage facilities and solid waste management systems are necessary to provide an adequate water supply, sewage facilities, gas distribution facilities or solid waste management system to serve rural residents of the district;

4. Whether such improvements or works will be conducive to and will tend to promote the public health, convenience and welfare;

5. The area which should be included in the district; and

6. Whether there is sufficient water available for purchase or available for appropriation by the Oklahoma Water Resources Board.

Title 82 Oklahoma Statutes §1324.6.

Because state law decides a water district's territory, and the County Commissioners make findings that the inclusion of an area into a water district is conducive to the public health, convenience and welfare, it is inappropriate for the Court to follow any rule other than the "Bright Line Rule" in relation to §1926(b). To do so, would be to effectively remove areas from the water district's territory in contravention to state and federal law.

CONCLUSION

If the Court grants certiorari in this case to Petitioners in an attempt to put an end to litigation based upon 7 U.S.C. §1926(b), and for the purpose of clarifying the standard for interpretation and explaining the remedies available, the Court should likewise address the issues presented by Respondent's Conditional Cross-Appeal for the same reasons.

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No.00-490

IN THE
SUPREME COURT OF THE UNITED STATES

PITTSBURG COUNTY RURAL WATER DISTRICT NO.7,
Petitioner,

v.

CITY OF MCALESTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONSE TO CROSS PETITION

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STATEMENT OF THE CASE

Pittsburg's Statement of the Case is incomplete in at least one respect. Pittsburg asserts on page 9 of its Cross-Petition that it purchased its original federal loans in 1989. This assertion is inconsistent with the conclusion reached by the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit concluded that while Pittsburg "repurchased" its outstanding indebtedness to the FmHA, its promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." [Appendix A, at p. 5a.] This distinction between Pittsburg's assertion and the Tenth Circuit's factual conclusion is important because of existing circuit-made case law on the impact on Section 1926(b) protection of the satisfaction of an outstanding loan from the FmHA.

ARGUMENT AGAINST GRANTING PITTSBURG'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

McAlester agrees with Pittsburg on one issue: that the test for application of 7 U.S.C. § 1926(b) should be reviewed by the U.S. Supreme Court. In its conditional cross petition for writ of certiorari, Pittsburg argues that the Court should adopt a "bright line rule" for application of Section 1926(b). Pittsburg supports its proposed "bright line rule" with selective quotation from a few decisions from courts that have taken an extreme approach to Section 1926(b) interpretation.

The complexities of state law cause such a "bright line rule" to be unworkable. In some states, the established territory of a rural water association qualifying for federal loans is determined on a step-by-step basis, with each addition to the territory approved after a careful analysis of the needs of the area and the capacity of the rural water association. In

other states, such as Oklahoma, the state statutes governing creation of a rural water association allow a one-time formation document to include a description of a vast and typically vaguely described area as the association's territory. The association's original territory could include areas that are located significant distances from the association's water distribution facilities. In some cases, an association's territory includes land that is separated from the association's water distribution facilities by a highway or a body of water. As a result, it is nearly impossible for the association to serve the water needs of its entire territory without substantial additional capital expenditures.

Pittsburg's position on the "bright line rule" must be viewed with skepticism, particularly when it is understood that Pittsburg would argue against any action by governing state agencies to remove an area from a rural water association's territory. [Appendix D, at p. 50a.] The "bright line rule" would provide anticompetitive protection for areas that were included within a rural water association's territory long before the association borrowed funds from the federal government. The anticompetitive protection would apply even if the association has insufficient capacity or facilities to serve the area. Under Pittsburg's proposed scheme, landowners in the area would be powerless to remove their land from the rural water association's territory.

In short, Pittsburg's proposed "bright line rule" ignores the clear terms of the statute. The rule proposed by Pittsburg should be rejected in favor of the standard offered by McAlester in its Petition for Writ of Certiorari, filed in Case No. 00-323.

ARGUMENT 1

Every federal court to consider the issue has rejected the argument advanced by Pittsburg in its Cross Petition that it should receive continued Section 1926(b) protection based on federal loans that were satisfied in full.

The first question presented by Pittsburg's Cross Petition rests solely on a legal issue – whether Section 1926(b) protection was extinguished when Pittsburg satisfied its obligations to the FmHA in 1989. The Agricultural Credit Act of 1987 contained a provision known as "subsection (g)," stating that 7 U.S.C. § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act. *See* 7 U.S.C. § 1929a note ("Applicability of Prohibition on Curtailment or Limitation of Service"). *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 40 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997). Pittsburg's Cross Petition raises the issue of whether subsection (g)'s provision that Section 1926(b) applies to "all" obligations "sold or intended to be sold" means that Section 1926(b)'s protection extends to a borrower that buys back its own loans from the FmHA, effectively extinguishing them. *Id.*

Every federal court that has addressed this issue, including the District Court and Tenth Circuit in this case, has decided the issue in McAlester's favor. *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 43 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997); *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192, 1200 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000); *Bell Arthur Water Corp. v.*

Greenville Util. Comm'n, 173 F.3d 517, 523 (4th Cir. 1999), *aff'g* 972 F. Supp. 951, 957-59 (E.D.N.C. 1997); *Rural Water System #1 v. Sioux Center*, 967 F. Supp. 1483, 1523 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 68 U.S.L.W. 3774 (2000); *see also Public Water Supply Dist. No. 10 v. Peculiar*, 971 S.W.2d 849, 852 (Mo. Ct. App. 1998).

The *Scioto County* court was the first federal court to address the argument raised in this case by Pittsburg in its first question presented on petition for certiorari. The plaintiff rural water association in Scioto County argued that bond issuers (or FmHA borrowers) "that exercised their right to buy back their bonds are entitled to the same § 1926(b) curtailment protection that is available to third-party bond purchasers." *Id.* The plaintiff rural water association argued that viewing subsection (f) and subsection (g) together leads to the conclusion "that the bond issuer's right of first refusal incorporates the right to continued protection against curtailment." *Id.* "Water 1 insists that it is therefore entitled to the same § 1926(b) protection that would have been available to a third-party purchaser of its bonds." *Id.*

In *Scioto County*, the court's conclusion on this issue rested on one critical fact. The plaintiff rural water association's obligation to FmHA was marked "paid in full." *Id.* at 42. As a result, its FmHA debt "was thus discharged, not sold." *Id.* Based on this critical fact, the *Scioto County* court concluded that "[w]hen an [FmHA bond] issuer buys back it own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) – safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest

in protecting against competition diminishes as its loans are repaid." *Id.*

This holding by the *Scioto County* court is conclusive in this case. The earlier FmHA loans received by Pittsburg were repaid in 1989. As the trial court found, "[t]he promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA' and the debt was no longer carried upon [Pittsburg's] financial records." [Appendix D, at p. 38a.] As a result, the FmHA obligations of Pittsburg were extinguished in 1989, and any Section 1926(b) protection enjoyed by Pittsburg ended at that time.

This conclusion is consistent with the decisions of all subsequent federal courts that have addressed the issue of the cancellation of FmHA indebtedness. In 1997, the U.S. District Court for the Northern District of Iowa conducted an in-depth review of legislative history related to the issue of the impact of extinguishment of FmHA debt on Section 1926(b) protection. *Sioux Center*, 967 F. Supp. at 1521-23. Based on this review, the *Sioux Center* court determined that it "can only conclude ... that the protection of § 1926(b) through subsection (g) does not extend to a party such as RWS #1 who bought back its notes pursuant to subsection (f), and thereby extinguished them. Consequently, RWS #1 lost the protections of § 1926(b) when it bought back its notes in 1988 and did not regain any protection of § 1926(b) until RWS #1 again became indebted to the United States in 1992." *Id.* at 1523. In *Sioux Center*, the plaintiff rural water association's FmHA loans were marked "paid in full" at the time that they were refinanced. *Id.* at 1502. The district court's decision was recently affirmed in pertinent part by the U.S. Court of Appeals for the Eighth Circuit. *Rural Water System #1 v. Sioux Center*, 202 F.3d 1035 (8th Cir.), *cert. denied*, 68 U.S.L.W. 3774 (2000).

Also in 1997, the U.S. District Court for the Eastern District of North Carolina the issue of the impact of extinguishment of FmHA debt on Section 1926(b) protection. *Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 972 F. Supp. 951, 956-59 (E.D.N.C. 1997). In *Bell Arthur*, the plaintiff rural water association conceded that its earlier FmHA debt "may technically have been 'satisfied' or 'paid in full.'" *Id.* at 956. Nonetheless, the plaintiff rural water association argued that its participation in a congressionally authorized "buy-out" program – the same program addressed by the *Scioto County* and *Sioux Center* courts – provided it with continued Section 1926(b) protection. *Id.* Relying on *Scioto County* and *Sioux Center*, the *Bell Arthur* court concluded that "any protection afforded to BAWC pursuant to § 1926(b) was extinguished when it paid off its FmHA loans in 1987." *Bell Arthur*, 972 F. Supp. at 959. The district court decision was affirmed by the U.S. Court of Appeals for the Sixth Circuit, which specifically affirmed the district court's decision on this issue. *Bell Arthur Water Corp. v. Greenville Util. Comm'n*, 173 F.3d 517, 523 (4th Cir. 1999).

On June 16, 1998, the Missouri Court of Appeals addressed the issue of the impact on Section 1926(b) protection of the extinguishment of FmHA debt. *Public Water Supply Dist. No. 10 v. Peculiar*, 971 S.W.2d 849, 852 (Mo. Ct. App. 1998). The *Peculiar* court noted that "[n]either subsection (g) nor any other statutory language mentions service area protection in the event a water district takes advantage of its right of first refusal and decides to refinance its loan through issuance of refund bonds or a conventional bank loan." *Id.* at 852. In *Peculiar*, the rural water association "extinguished its indebtedness to FmHA in July, 1987 when it repurchased [its] 1983 bonds, and FmHA returned them, marked 'Cancelled.'" *Id.* Based on these

facts, the *Peculiar* court concluded that the rural water association "did not intend that the debt on the 1983 bonds remain outstanding. Instead, it issued a new series of bonds and sold them to various private parties to finance the repurchase and subsequent cancellation of the\1983 bonds. When faced with identical fact situations, where a rural water district refinances its FmHA loan and in the process completely extinguishes its debt on the bonds purchased by [sic] the government, other jurisdictions hold that § 1926(b) protection is lost." *Id.* at 853.

In its conditional cross petition for writ of certiorari, Pittsburg is faced with a difficult challenge on this issue. Pittsburg cannot avoid the fact that all federal courts that have addressed the issue have concluded that Section 1926(b) protection ends when an FmHA loan is paid and marked as "satisifed" or "paid in full." Pittsburg cannot avoid the fact that the most critical factual issue relied upon by the *Scioto County*, *Sioux Center*, and *Bell Arthur* courts is clearly against Pittsburg in this case: As the trial court found, "[t]he promissory notes to the FmHA were marked 'SATISFIED IN FULL - FmHA.'" [Appendix D, at p. 38a.] Faced with this daunting challenge, Pittsburg can turn only to two state-court decisions that have reached a different conclusion on narrow and distinguishable facts. [Cross Petition, at pp. 12-13 (citing *Grand Junction v. UTE Water Conservatory Dist.*, 900 P.2d 81 (Colo. 1995), and *Wetumpka v. Central Elmore Water Auth.*, 703 So. 2d 907 (Ala. 1997).

The decision by the Supreme Court of Colorado in *Grand Junction v. UTE Water Conservatory District* was closely examined by both the *Scioto County* and *Sioux Center* courts. In *Scioto County*, the U.S. Court of Appeals for the Sixth Circuit distinguished the *Grand Junction* decision. "In that case, the Colorado court found that § 1926(b)'s

protection extends to those that buy back bonds only if the bonds are reacquired 'with the intent not to discharge the instrument.' 900 P.2d at 92. The *Ute Water* court analyzed the question of intent and looked to Colorado law to determine whether the reacquisition of a bond discharged the debt. Unlike the loan documents in *Ute Water*, the loan documents in this case were marked 'paid in full.'" *Scioto County*, 103 F.3d at 42. The point of distinction upon which the *Scioto County* court relied was the rural water association's treatment of the paid FmHA obligation. In *Scioto County*, as in the case before this Court, the FmHA obligation was marked as paid in full.

Pittsburg's treatment of this issue in its conditional cross petition for writ of certiorari, and in particular its treatment of the *Scioto County* decision, reveals the weakness of its position. Pittsburg's only effort to persuade this Court to disagree with the *Scioto County* decision is to argue that the *Scioto County* court determined that Section 1926(b) protection "is only extended when the notes are purchased by third parties," and to argue that "such decision ignores the plain language of [7 U.S.C. § 1929a]." [Cross Petition, at p. 12.]

First, Pittsburg's characterization of the *Scioto County* court's decision misstates its rationale. The *Scioto County* court concluded that "[w]hen an issuer buys back its own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection." *Scioto County*, 103 F.3d at 42. Thus, the *Scioto County* court leaves open the possibility that, in a *Grand Junction* circumstance where "a bond issuer ... reacquire[s] its own bond without extinguishing the debt," as allowed by Colorado law. *Id.* at 41.

Second, Pittsburg offers no support whatsoever for its conclusory argument that the *Scioto County* decision "ignores the plain meaning" of 7 U.S.C. § 1929a. Without elaboration by Pittsburg regarding its "plain meaning" argument, it would be difficult for the Respondents to respond to the argument. However, Pittsburg may be referring to arguments raised by the plaintiff rural water association in *Sioux Center*. In *Sioux Center*, the plaintiff argued that the plain meaning of subsection (g) to 7 U.S.C. § 1929a would include, within the extended protection offered by subsection (g), those FmHA bonds that are repurchased by the rural water association that is obligated on the bonds. *Sioux Center*, 967 F. Supp. at 1516-20. The *Sioux Center* court rejected that argument, holding that "it is irrational to read subsection (g) as including notes sold under subsection (f) within a strained reading of notes 'intended to be sold under this section,' when a sale under subsection (f) involves significantly different timing and terms from a sale under subsections (a)-(e)." *Sioux Center*, 967 F. Supp. at 1520.

The Court should reject Pittsburg's request for certiorari review of this issue. Pittsburg has failed to show a disagreement among the federal courts addressing the issue. The federal courts that have addressed the issue have properly applied federal statutory law, and have determined that a rural water association that satisfies its federal debt, whether through refinance or repurchase, is no longer entitled to Section 1926(b) protection based on that debt.

ARGUMENT 2

Pittsburg has misinterpreted and overstated the test adopted by a handful of federal courts, offered here by Pittsburg as a "bright line rule."

McAlester agrees with Pittsburg that the Court should review and address the proper standard for application of the anticompetitive protection found in 7 U.S.C. § 1926(b). The "bright line rule" offered by Pittsburg in the second question presented in its conditional cross petition for writ of certiorari, however, is inconsistent with the terms of the statute.

The terms of Section 1926(b) require, as a condition for any anticompetitive protection, that a rural water association make water service available to its claimed customers. The nature of rural water associations formed under state law requires that the complexities of state law be considered in determining whether the association has made service available. The federal courts faced with the issue have looked to state law to determine the boundaries of the rural water association, and to determine whether a rural water association has made service available. *Sioux Center*, 967 F. Supp. at 1525, 1530; *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996); *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 234-35 (6th Cir. 1996).

The *Sioux Center* court defined the importance of state law to this determination. "State law, and only state law, ... defines a municipality's right to annex portions of the association's service area, just as state law, and only state law, otherwise defines where it is the association can legally

initiate or continue to provide service. If the association again becomes indebted to the FmHA, its protected service area is defined by state law as of the date of the renewed indebtedness." *Sioux Center*, 967 F. Supp. at 1530.

At least one court has determined that a state law duty to provide service "is the legal equivalent to" making service available under Section 1926(b). *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 916 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). In the case at bar, the Tenth Circuit was asked to determine whether Oklahoma law imposed on rural water associations a duty to serve their customers. The Tenth Circuit determined that state law imposed no such duty to serve. *Sequoyah County Rural Water Dist. No. 7 v. Muldrow*, 191 F.3d 1192, 1202 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1532, 120 S. Ct. 1548 (2000).

In urging a reversal of the Tenth Circuit on this issue of state law, Pittsburg references several provisions of the Oklahoma statutes governing formation of rural water districts. First, Pittsburg urges that its claimed legal obligation to serve "residents within its Territory" is found in Okla. Stat. tit. 82, § 1324.3. Section 1324.3 provides that "[p]ublic nonprofit rural water districts ... may be organized under this act for the purpose of developing and providing an adequate rural water supply, gas distribution facilities, sewage disposal facilities and solid waste management system to serve and meet the needs of rural residents within the territory of the district." Okla. Stat. tit. 82, § 1324.3 (1991). This statement of purpose falls far short of the creation of a duty to provide water service, or any other utility, to residents of the rural water district's territory.

To extend the general statements contained in Section 1324.3 to impose an obligation on Oklahoma rural water

associations would be contrary to general principles of statutory construction. Courts generally are not eager to interpret statutes as imposing obligations or liabilities on a state agency, unless the obligation is clearly stated in the statute. *See, e.g.*, *Mariposa County v. Merced Irrigation Dist.*, 196 P.2d 920, 925 (Cal. 1948); *West Norman Timber, Inc. v. State*, 224 P.2d 635, 640 (Wash. 1950). As the *Mariposa County* court concluded, "[s]tatutes are ordinarily designed for the government of citizens and residences rather than the state, and it is settled that the state is not bound by general words of a statute or code provision which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the intent to bind it thereby otherwise clearly appears." *Mariposa County*, 196 P.2d at 925 (quoting 23 Cal. Jur. 625).

Second, Pittsburg points to the "benefit unit" system contained in Okla. Stat. tit. 82, § 1324.12 as the source of its claimed legal obligation to serve "residents within its Territory." The "benefit unit" system demonstrates that water service to residents within Pittsburg's territory is a function of Pittsburg's discretion, rather than a "duty to serve." Section 1324.12 provides as follows:

> . . . The total benefits of any such improvement shall be divided into a suitable number of benefit units. Upon determining a schedule of benefit units and unit fees, the board of directors shall cause a declaration of availability of such units for subscription to be entered in its minutes and except for residents of cities and towns as provided in paragraph 5 of Section 1324.2 of this title any individual who fails to become a participating member

> within thirty (30) days thereafter shall not be eligible to hold office as a director, nor shall any individual, firm, partnership, association, or corporation which fails to become a participating member within ninety (90) days after such declaration be qualified to participate at any meeting or vote at any election held thereafter unless such individual, firm, partnership, association, or corporation shall thereafter become a participating member. *Each landowner within the district shall subscribe to a number of such units in proportion to the extent he desires to participate in the benefits of the improvements. As long as the capacity of the district's facilities permits*, participating members of the district may subscribe to additional units upon payment of a unit fee for each such unit. *Owners or tenants of land located within the district who are not participating members may subscribe to such units as the Board in its discretion may grant*, and upon payment of the unit fee for each such unit shall be entitled to the same rights as original participating members.

Okla. Stat. tit. 82, § 1324.12 (Supp. 1997) (emphasis added).

As can be seen from the text of the statute, the "benefit units" referred to by Pittsburg in its conditional cross petition for writ of certiorari are available only at the rural water district's discretion and the occupant's desire. Okla. Stat. tit. 82, § 1324.12 (Supp. 1997). While Okla. Stat. tit. 82, § 1324.2(7) may provide "a legal right to one service connection," Section 1324.12 limits the availability of

additional benefit units to current subscribers, based on the capacity of the district's facilities. *Id.* Section 1324.12 further limits the availability of benefit units to "[o]wners or tenants of land located within the district who are not participating members" of the rural water association. Benefit units are available to such owners and tenants only upon the discretion of the rural water association's board. *Id.*

Finally, Pittsburg argues that its "legal duty to serve" can be found in the federal regulations governing FmHA loans. [Cross Petition, at p. 20 (citing 7 C.F.R. § 1942.17(n)(2)(vii)).] Faced with the absence of supporting state law, Pittsburg has turned to federal law as providing an obligation to provide service. In doing so, however, Pittsburg has overlooked the clear terms of the cases upon which it relies in making this argument. The legal obligation to provide water service, urged by Pittsburg, must be provided by state law, rather than by federal law. *See North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 916 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996). Pittsburg's claimed territory is determined by reference to state law, rather than to federal law. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 234 (6th Cir. 1996); *Sioux Center*, 967 F. Supp. at 1530.

Pittsburg attempts to bootstrap the provisions of 7 C.F.R. § 1942.17(n)(2)(vii) into the Oklahoma statutes governing rural water associations, by pointing to the Oklahoma statute authorizing rural water associations to borrow money from the federal government. [Cross Petition, at p. 20-21.] The Court should reject this attempted bootstrap because Pittsburg has put the cart before the horse. Section 1926(b) protection, and its attendant regulations, do not apply to Pittsburg if Pittsburg has failed to meet the elements of Section 1926(b) protection. The federal obligation to provide

water, therefore, does not apply to Pittsburg until it can establish that it has "made service available." This is the conclusion that was reached by the Tenth Circuit in *Sequoyah*, when faced by the same argument by attorneys for Pittsburg. *Sequoyah*, 191 F.3d at 1203 n.9.

Even if this Court determines that an obligation to serve may be based on federal law, the regulation cited by Pittsburg does not provide the necessary obligation to serve. Section 1942.17 does not impose an obligation to serve. A rural water association may deny water service to a user within the district's service area, even if the user desires service. 7 C.F.R. § 1942.17(e)(1). Section 1942.17(e)(1) states that installation of water services is dependent upon the feasibility of such service. *Id.* Similarly, water service from a rural water district may be declined by the user. *Id.*

As these authorities demonstrate, Oklahoma law imposes no obligation to serve. Pittsburg has failed to demonstrate any source of an obligation to serve occupants within its territory. As a result, the "legal-duty-to-serve" test does not apply in this case. Furthermore, it is not enough in a Section 1926(b) case for Pittsburg to simply show that it has "a precisely-drawn service area," or that it has water lines in the general vicinity of the disputed area. *Lexington-South Elkhorn*, 93 F.3d at 234. A rural water association asserting anticompetitive protection based on 7 U.S.C. § 1926(b) should be required to show more. The clear text of Section 1926(b) requires, as a condition for anticompetitive protection, that the rural water association make service available. 7 U.S.C. § 1926(b) (protecting "[t]he service provided or made available through any such association"). To expand the concept of "made available" to reach areas that were never served by the claiming rural water association, that the rural water association could not serve, and that

simply fall within a geographic territory vaguely described in a years-old formation document would be to create a legal fiction that would destroy the purpose of Section 1926(b).

CONCLUSION

For the reasons outlined above, Respondent McAlester respectfully suggests that the Court deny Pittsburg's conditional cross petition for writ of certiorari. The first question presented by Pittsburg's cross petition raises an argument that has been universally rejected by the federal courts confronted with it. The second question presented is closely aligned with the issues raised by McAlester's Petition for Writ of Certiorari in Case No. 00-323. However, the second question is based upon a strained reading of legal authorities, and represents an attempt by Pittsburg to impose an onerous interpretation on Section 1926(b), one that would be entirely inconsistent with the statute's plain terms.

/s/_____
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